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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 306

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF THE APPLICATION.

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SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	2
Jurisdiction of the Court	3
Questions Presented	3
Reasons Relied Upon	4
Prayer	4
Brief	5
Opinions Below	5
Jurisdiction	5
Statement of the Case	6
Specification of Errors	6
Argument	7
Error as to Local Law	7
Denial of Full Faith and Credit	16

CITATIONS.

Aiken v. Insull, 122 Fed. (2d) 746, at 751 14
Babka v. City State Bank of Chicago, 264 Ill. App. 142. 14
Benjamin v. McConnell, 4 Gilman 536; 9 Ill. 442 (1847) 7, 12, 15
City National Bank & Trust Co. v. Burnham, 297 Ill. App. 211, at 236 12
Clark v. Mallory, 185 Ill. 227, 233 12
Dupee v. Blake, 148 Ill. 453 12
Forster v. Sheridan Tr. & Svs. Bk., 257 Ill. App. 463, at 472 ..... 12, 15
Milliken v. Meyer, 311 U. S. 457, 61 Sup. Ct. Rep. 339. 16
Moore v. Stanwood, 98 Ill. 605 11
Mueller v. Lloyd, 181 Ill. App. 230, at 245-6 12
Nickerson v. Suplee, 174 Ill. App. 136, at 139 12
Parmelee, et al. v. Lawrence, 44 Ill. 405 ..... 7, 8, 11, 12, 15
People v. Farmers State Bank, 281 Ill. App. 354 17
People v. Ottawa B. & T. Co., 287 Ill. App. 499, 5 N. E. (2d) 275 17
Rice v. Barkman, 249 Ill. App. 127, at 130 12
Rice v. Webster, 18 Ill. 331 ..... 8, 12, 15
Reconstruction Finance Corp. v. McCormick, 102 Fed. (2d) 305 12
Thomason v. Clark, 31 Ill. 404, at 407 12
Van Meter v. Gurney, 251 Ill. App. 184, at 187 11
Wallace v. Armstrong, 236 Ill. App. 457, at 460 12
West v. American Tel. & Tel., 311 U. S. 233, at 236-7 ... 15

TEXTS.

53 C. J., 1251, par. 74. Also footnote..... 11
Illinois Annotation to the Restatement of the Law of Contracts, Sec. 122 10
Illinois Annotation to the Restatement of the Law of Contracts, Sec. 403 10
Restatement of the Law of Contracts, Sec. 122..... 10
Restatement of the Law of Contracts, Sec. 403..... 10
Scott on Trusts, Sec. 198..... 14
Williston on Contracts, Revised Edition, Volume 2, Paragraph 338, Pages 992-3 9

STATUTES.

Title 28, Sec. 687, U. S. C. A..... 16

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ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner Alfred Cookman Miner, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased, prays the issuance of a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit affirming an order entered upon appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Summary Statement of the Matter Involved.

Petitioner, Alfred Cookman Miner, was appointed on November 10, 1933, as Successor Trustee of a trust established by the Will of his mother, Julia A. Miner (R. 111-115). The assets of the trust had been completely dissipated by the prior Trustee, Central Republic Trust Company, and its predecessor corporations (R. 16-22; 25-32). The court appointing Miner expressly reserved determination of issues raised by the accounting. Thereafter, on February 21, 1938, Miner filed his claim in the instant case asserting a liability against the stockholders of the Central Republic Trust Company and its predecessor corporations. While his claim against the stockholders was still pending, Miner agreed to accept a claim against the assets of the bank in the amount of $25,000.00, provided that it should be without prejudice to his claim against the stockholders (R. 23-25). A decree was entered by the court which appointed Miner, finding that breaches of trust had been committed and that the net loss amounted to $25,000.00. The decree directed the filing of a claim in the suit then pending to liquidate the affairs of the Central Republic Trust Company, which had ceased to do business (R. 32-39). Miner, thereupon, filed a petition in the liquidation proceeding and was allowed a claim against the assets of the bank in the amount of $25,000.00 (R. 39-43). The decree of the court, after reviewing the previous proceedings, expressly found that the acceptance of the claim in the amount of $25,000.00 against the assets in the receiver's hands should be without prejudice to the right of Miner to continue to prosecute his claim in a larger amount against the stockholders in the present case; that the amount had been determined by agreement without proof; that part of the agreement was that the settlement should not prejudice the prosecution of the claim against the stockholders; that the fixing of the claim at $25,000.00 was not

to be deemed an adjudication of the amount of damage suffered by the trust estate but merely a determination of the extent of participation by the trust estate in the assets in the receiver's hands; that any amount paid by the receiver should be credited upon the claim allowed against the stockholders (R. 39-43). In the federal court the Master heard evidence as to the merits of the claim (R. 15-32; 70-111) but held that Miner's recovery against the stockholders was limited by the amount which he had agreed to accept as his participation in the assets in the receiver's hands (R. 44-48). The Master's Report was approved by the District Court (R. 54-55). The Circuit Court affirmed the ruling of the District Court.

Jurisdiction of the Court.

The jurisdiction of this court is invoked under Section 240-A of the Juricial Code, as amended by the act of February 13, 1925. The decision hereby sought to be reviewed was entered May 18, 1942. The opinion (R. 120-124) is reported at 128 Fed. (2d) 242.

Questions Presented.

1. Whether the federal court is justified in ignoring and holding ineffectual an express reservation of right against a co-obligor, by relying upon Illinois cases which have been overruled and ignoring numerous sources revealing a uniform and well understood principle of Illinois law.

2. Whether the federal court is required to give full faith and credit to the judgment of the Circuit Court of Cook County, Illinois, entered April 13, 1940, expressly reserving the right of the claimant to proceed against the stockholders of the Central Republic Bank and Trust Company for a greater amount than $25,000.00.

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of Illinois law in conflict with applicable local decisions by relying upon cases which have been overruled and ignoring a subsequent line of decisions by the intermediate courts of review in Illinois.

2. The Circuit Court has refused to give full faith and credit to the judgment of an Illinois court of general jurisdiction.

Prayer.

WHEREFORE, Petitioner prays that this court may issue its writ of certiorari to review the aforesaid judgment of the Circuit Court of Appeals for the Seventh Circuit.

ALFRED COOKMAN MINER, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased,

Petitioner,

GEORGE EDWARD LEONARD,

Counsel for Petitioner.

IN THE

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Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

There was no written opinion by the District Court, which adopted the Master's Report (R. 44-48). The opinion of the Circuit Court of Appeals (R. 120-125) is reported as *"Reconstruction Finance Corp.* v. *Central Republic Trust Co.*, 128 F. (2d) 242."

Jurisdiction.

The jurisdiction of this court is invoked under Section 240-A of the Judicial Code, as amended by the act of February 13, 1925. The decision hereby sought to be reviewed was entered May 18, 1942.

Statement of the Case.

The present case was instituted by the Reconstruction Finance Corporation, as a representative suit on behalf of itself and all other creditors of the Central Republic Trust Company and its predecesesor corporations, against the stockholders of said corporations to enforce the liability imposed by the Illinois constitution. Petitioner appeared pursuant to notice and introduced evidence of a claim against the stockholders in the amount of $229,409.52. No proof was introduced by the stockholders. The Master refused to consider the claim upon its merits, holding that orders of the Circuit Court introduced in evidence by the petitioner and the respondent limited the claim to the amount of $25,000.00 (R. 44-8). The Master's Report was approved by the District Court, and the order of the District Court affirmed by the Circuit Court of Appeals. A concise statement of the material facts is set forth on the second and third pages of the petition and is not, therefore, repeated here.

Specification of Errors.

1. The court below erred in ignoring and holding ineffectual an express reservation of right against a co-obligor by relying upon Illinois cases which have been overruled and ignoring numerous sources revealing a uniform and well understood principle of Illinois law.

2. The court below erred in refusing to give full faith and credit to the judgment of the Circuit Court of Cook County, Illinois, entered April 13, 1940, expressly reserving the right of the claimant to proceed against the stockholders of the Central Republic Bank and Trust Company for a greater amount than $25,000.00.

ARGUMENT.

I.

The Court Below Decided an Important Question of Illinois Law Upon Overruled Cases, and Has Rejected Overwhelming Evidence of a Contrary Local Rule Uniformly Followed for Over Half a Century.

Until the decision in the present case, the law of Illinois was thought to be clearly settled that if one co-obligor were released with an express reservation of right against others, the release would be considered as a covenant not to sue and would be no bar to the prosecution of claims against those co-obligors as to whom rights were reserved. The decision here sought to be reviewed, ignoring a long line of Illinois authority to the contrary, reverts to the ancient common law rule that if words of release are used in discharging one co-obligor all other co-obligors are thereby discharged, regardless of any attempted reservation, which was considered repugnant and void. Apparently this ancient and much criticised common law doctrine persists in Illinois in tort cases but the modern view was established in Illinois as early as 1867 in the case of *Parmelee, et al.* v. *Lawrence,* 44 Ill. 405. It is true that in the case of *Benjamin* v. *McConnell,* 4 Gilman 536; 9 Ill. 442, (decided in 1847) the Supreme Court of Illinois laid down the rule that the release of one of two or more joint obligors was *ipso facto* a release of all and an express proviso to the contrary, being repugnant to the contract of release itself, was void. Russell H. Curtis, an eminent member of the Chicago Bar who annotated these reports, makes the following comment upon this case, which is ap-

pended in a footnote appearing at the bottom of page 443 in the present official report:

> "Overruled. If release of one of several obligors shows upon its face in connection with surrounding facts, that it was intention of parties not to release co-obligors, such intention will be given effect. *Parmelee* v. *Lawrence,* 44 Ill. 405, 413; *Parmelee* v. *Lawrence,* also overruled, *Rice* v. *Webster,* 18 Ill. 331, 333, which followed *Benjamin* v. *McConnell.*"

In 1857 the court, in the case of *Rice* v. *Webster,* 18 Ill. 331, adhered to the rule of *Benjamin* v. *McConnell.* In the present official reports an annotation by Messrs. Edwin Burritt Smith and Ernest Hitchcock of the Chicago Bar is as follows:

> "But see *Parmelee, et al.* v. *Lawrence,* 44 Ill. 405, for a review of these cases, and where it is said the weight of modern authority is against them, and in favor of the doctrine of intention, as governing such releases."

Counsel for appellant earnestly insisted in the court below that the *Rice* and *Benjamin* cases were in fact, though not expressly, overruled in the case of *Parmelee* v. *Lawrence,* 44 Ill. 405, in which the court states, at page 413:

> "On the question as to the effect of this release, counsel for appellants have cited the cases of *Benjamin* v. *McConnell,* 4 Gilm. 536, and *Rice* v. *Webster,* 18 Ill. 331. It will be observed from what we have already said that there are facts in this case which widely distinguish it from either of those. We would further add that the weight of the modern authorities is against these cases, and in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue. Parsons, in his work on contracts, volume 1, page 24, uses the

following language: 'But though the word "release" be used, even under seal, yet if the parties (the instrument being considered as a whole, and in connection with all the circumstances of the case and the relations of the parties) cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; for a general covenant not to sue is not of itself a release of the covenantee, but is so construed by the law to avoid circuity of action; and a covenant not to sue one of many who are jointly indebted does not discharge one who is a joint debtor to the covenantor, nor in any way affect his obligation.' This rule is substantially so laid down in the following cases: *North* v. *Wakefield,* 66 Eng. C. L. 536; *Willis* v. *DeCastro,* 93 id. 215; *Sully* v. *Forbes,* 2 B. & B. 46; *Kirby* v. *Taylor,* 6 Johns. Ch. 242; *Clagett* v. *Salmon,* 5 Gill & Johns. 351; *Lysaght* v. *Phillips,* 5 Duer, 116; *Wiggin* v. *Tudor,* 23 Pick. 444; R. M. Charlton (Geo.) 267."

From the foregoing language, it would appear that the Supreme Court of Illinois, while wishing to avoid the judicial discourtesy of expressly overruling by name the considered decisions of judges no longer sitting upon the court, chose rather to distinguish the cases upon the facts but proceeded to lay down in very clear terms a precisely contrary doctrine from that of the cases nominally distinguished.

In Williston on Contracts, Revised Edition, Volume 2, Paragraph 338, Pages 992-3, appears the following statement:

"The same effect is given to a release by the creditor which contains an express reservation of his rights against the other joint debtors. In fact such an instrument is in terms contradictory. If it is to be regarded as a true release of one joint debtor, it would be legally impossible to reserve rights against the others, for their obligations could not continue to exist without all being bound. In order to give effect to the

> manifest intention of the parties as nearly as possible, the courts have therefore held that a release with such a reservation is in legal effect no release at all, but merely a covenant not to sue."

In accord with this statement the text cites the Restatement of Contracts, Paragraph 122, and numerous cases *inter alia:*

"*Parmelee* v. *Lawrence,* 44 Ill. 405 (virtually overruling *Rice* v. *Webster,* 18 Ill. 331); *Van Meter* v. *Gurney,* 251 Ill. App. 184."

In the Restatement of the Law of Contracts, Section 122, the rule is stated:

> "Written or oral words of a person entitled to enforce a promise which purport to discharge the promisor but expressly to reserve rights against other promisors jointly bound for the same performance do not operate as a discharge of the promisor but only as a promise not to sue him, except that a written discharge cannot be varied by an accompanying oral statement or agreement that rights against other promisors are reserved."

The Illinois annotation to the restatement, prepared by Harold Wright Holt under the auspices of the Illinois Bar Association, makes the following comment upon this section:

> "*Parmelee* v. *Lawrence* (1867) 44 Ill. 405; Id. (1870) 11 Wall. (78 U. S.) 36, 20 L. Ed. 48 seems to have settled the law of this state in accord with the Restatement as to the effect of the release of one joint obligor with reservation of rights against others."

Paragraph 403 of the Restatement is that:

> "A release may be in any form of words, but general words of release may be controlled by recitals and by context showing that unless the words of release are so restricted the object of the writing will be frustrated."

The Illinois annotation upon this section is as follows:

> "The law of Illinois *accords.*
>
> "*Accord* with the *Illustration: Parmelee* v. *Lawrence* (1867) 44 Ill. 405 (which overrules *Benjamin* v. *Mc-*

Connel (1847) 4 Gilman 536, 46 Am. Dec. 474 and *Rice* v. *Webster* (1857) 18 Ill. 331): *Thomason* v. *Clark* (1889) 31 Ill. App. 404; *Nickerson* v. *Suplee* (1912) 174 Ill. App. 136, 139 (*dictum*). A release of right against a principal debtor, with a reservation of right against a surety, is treated as a covenant not to sue the principal debtor: *Mueller* v. *Dobschuetz* (1878) 89 Ill. 176 (*semble*); *Dupee* v. *Blake* (1893) 148 Ill. 453, 465, 35 N. E. 867, 871."

The following statement appears in 53 C. J., 1251, upon the subject of release, paragraph 74:

> "There is more authority to the effect that where the intention of the releasor not to release obligors other than the releasee is manifested by such an express reservation, it will prevail."

The following note is appended thereto:

> "*Parmelee* v. *Lawrence,* 44 Ill. 405 (distinguishing and not following *Rice* v. *Webster,* 18 Ill. 331, and *Benjamin* v. *McConnel,* 9 Ill. 536, 46 Am. Dec. 474); *Van Meter* v. *Gurney,* 251 Ill. App. 184. Contra *Rice* v. *Webster,* 18 Ill. 331; *Benjamin* v. *McConnel,* 9 Ill. 545, 46 Am. Dec. 474."

In the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, the court stated at page 187:

> "We do not consider *Rice* v. *Webster,* 18 Ill. 331, or *Petroyeanis* v. *Pirola,* 205 Ill. App. 310, as controlling. The former case was in effect overruled in *Parmelee* v. *Lawrence,* 44 Ill. 405."

In the case of *Moore* v. *Stanwood,* 98 Ill. 605, the Supreme Court held that the discharge of one of several co-obligors did not operate to discharge the remainder, relying upon the authority of *Parmelee* v. *Lawrence,* 44 Ill. 405. It should be noted that in the present case the bank which was released, at the time of the release, was insolvent and had been in receivership for a number of years.

The rule laid down in *Parmelee* v. *Lawrence,* has been

quoted with approval by the Supreme Court of Illinois in the case of *Clark* v. *Mallory*, 185 Ill. 227, at 233.

The rule laid down in *Parmelee* v. *Lawrence* has been uniformly adhered to by the Appellate Court of Illinois in the following cases:

Thomason v. *Clark*, 31 Ill. App. 404, at 407.
Nickerson v. *Suplee*, 174 Ill. App. 136, at 139.
Mueller v. *Lloyd*, 181 Ill. App. 230, at 245-6.
Wallace v. *Armstrong*, 236 Ill. App. 457, at 460.
Rice v. *Barkman*, 249 Ill. App. 127, at 130.
Forster v. *Sheridan Tr. & Svs. Bk.*, 257 Ill. App. 463, at 472.

Although the stockholders of an Illinois bank are primarily and severally liable for the obligations of the bank and resort need not be made to the corporation (*Reconstruction Finance Corporation* v. *McCormick*, 102 Fed. 2nd 305) the reservation of right against the stockholders would be given effect if they were merely sureties. *Dupee* v. *Blake*, 148 Ill. 453 (citing *Parmelee* v. *Lawrence*). In the recent case of *City National Bank & Trust Company* v. *Burnham*, 297 Ill. App. 211, at 236, the court states:

> "The law of suretyship is well settled that where a creditor expressly reserves his rights against the surety, at the same time that he agrees with the principal to an extension of the contract, or even to a release of the principal, the surety will not be released. *Mueller* v. *Dobschuetz*, 89 Ill. 176; 4 Williston on Contracts, Revised Edition, Section 1230."

In the face of the foregoing sources of information as to the law of Illinois, the Circuit Court of Appeals has based its decision upon the principles laid down in the out-dated and discredited cases of *Rice* v. *Webster*, 18 Ill. 331; *Benjamin* v. *McConnell*, 9 Ill. 442. The court disposes of the contention that these cases have been overruled with the comment: "We think there is no merit in this contention" without discussion or analysis of the

authorities. Nor can it be said that the decision of the court may be justified upon any other ground since the issue is clearly defined. If it is possible by any language to reserve a right of action against one co-obligor in Illinois, while releasing that of another, such was the effect of the order of the Circuit Court of April 13, 1940 (R. 39-43). There is in that order no reservation by implication but the principles and intended effect of the order are spelled out in terms so clear that even he who rides may read. The order clearly has two parts: first, the finding that the claim of Miner against the assets in the hands of the receiver shall be limited to $25,000.00; and second, that the rights of Miner to continue to prosecute his claims against the stockholders shall be unaffected thereby. The court below has ignored the intention of the parties to the agreement and the express terms of the order revealing that intention, but held that in agreeing to limit his claims to $25,000.00 against the insolvent bank Miner necessarily and *ipso facto* limited his claim against the stockholders to the same amount in spite of the expressed intention that his rights against the stockholders be unimpaired.

It is no answer to say that the accounts were approved, for the accounts were approved in part only. The claims asserted by Miner against the trustee were, by agreement, sustained in a limited amount in the Circuit Court, but there has been no adjudication in any court of the full amount of Miner's claims. Proof was offered in the Federal District Court, which the court refused to consider because it held that when Miner agreed to limit his claim against the bank, without prejudice to his rights against the stockholders, he thereby limited his claim against the stockholders. The agreement of Miner and the receiver approved by the court presiding over the liquidation of the affairs of the Central Republic Trust Company, has been ignored by the Federal Courts. Miner's obligation under

the agreement is extended; the major benefit to be received therefrom is substantially refused.

It is conceded that in Illinois the release of one joint tort-feasor would release all, but it cannot be urged that the liability here asserted is in tort. The distinction between liability in tort and for breach of trust is well understood. Scott on Trusts, Section 198. The liability of stockholders in Illinois banks is, of course, contractual. *Babka* v. *City State Bank of Chicago,* 264 Ill. App. 142. The Master appeared to place great reliance upon the memorandum opinion in the District Court in the case of *De Met's* v. *Samuel Insull* (R. 46-47). In that case the court held that all of the tort-feasors were released by the discharge of some of them. Upon appeal to the Circuit Court the distinction between liability in tort and in contract was sharply drawn. In the case, reported as *Aiken* v. *Insull,* 122 Fed. (2d) 746, at page 751, the court stated:

> "We take it, however, that the harsh rule as to a release of one joint tort-feasor does not prevail in the contract cases. *Parmelee* v. *Lawrence,* 44 Ill. 405; *Nickerson* v. *Suplee,* 174 Ill. App. 136. According to the *Parmelee* formula, if there is language in the release of a joint debtor manifesting an intent to preserve the releasor's rights against the other co-obligors, effect is given to this manifestation. Strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and common-sense formula to the tort cases. We fail to see a good reason for drawing this distinction between joint tort-feasor cases and joint debtor cases, compare *Brown* v. *City of Cambridge,* 3 Allen 474, 85 Mass. 474, 477, but we must accept the limitation fixed by the Illinois courts."

It seems quite clear that the court below has erroneously extended the rule applied in tort cases in Illinois to cover a case which is obviously one of contract.

It cannot be maintained that there is anything in the law of partnership in Illinois which would change the rule universally applied to joint or joint and several obliga-

tions. In the case of *Forster* v. *Sheridan Trust & Savings Bank*, 257 Ill. App. 463, the court held that a document which was in terms both a release and a covenant not to sue should, in the light of extrinsic circumstances, be considered to be a covenant not to sue. The court then, upon the authority of *Parmelee* v. *Lawrence*, 44 Ill. 405, held that the release of one partner did not operate to discharge a co-partner. This case cannot be reconciled with *Rice* v. *Webster* and *Benjamin* v. *McConnell*. Apparently, it, as well as all other of the cases heretofore cited in the Appellate Court, was ignored by the Circuit Court of Appeals simply because they were intermediate courts of review and not the Supreme Court of Illinois.

The court below in its opinion states (R. 124):

> "We think the decree of the district court which approved the conclusions of the master is in full accord with the decisions of the *highest* courts in Illinois." (Italics supplied.)

The rule is that a federal court must consider the decisions of intermediate courts as well as the Supreme Court in determining the questions of local law. The principle has been clearly stated by this court in the case of *West* v. *American Tel. & Tel.*, 311 U. S. 233, at pages 236-7 as follows:

> "A state is not without law save as its highest court has declared it. There are many rules of decision common and accepted and acted on by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from *all* the available data what the state law is and apply it rather than to prescribe a different rule. * * *" (Italics supplied.)

The court below has ignored decisions and dicta of both the Supreme Court and the Appellate Court of Illinois. It has ignored the opinions of scholars in the field. It has resorted to two early cases decided by the Supreme Court of Illinois and has failed to note that the uniform line of decisions in Illinois for more than eighty years has been to the contrary.

We challenge counsel for respondent to produce a single reported case in Illinois, decided since 1860, which by decision or dictum indicates that a joint obligor will be discharged by the release of his co-obligor in spite of an express reservation to the contrary.

II.

The Court Below Has Refused to Extend Full Faith and Credit to the Judgment of the Circuit Court of Cook County.

The courts below have refused to accord the judgment of the Circuit Court of Cook County the full faith and credit which is its due under Title 28, Section 687, U. S. C. A. In the case of *Milliken* v. *Meyer*, 311 U. S. 457, 61 Sup. Ct. Rep. 339, this court stated:

> "When a judgment rendered in one state is challenged in another, want of jurisdiction over either the person or the subject matter is, of course, open to inquiry. *Grover and Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Adam* v. *Saenger*, 303 U. S. 59. But if the judgment on its face appears to be a 'record of a court of general jurisdiction such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself.' *Adam* v. *Saenger, supra*, at page 62. In such a case the full faith and credit clause of the constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision or the validity of the legal principles on which the judg-

ment is based. *Fauntleroy* v. *Lum*, 210 U. S. 230; *Roche* v. *McDonald*, 275 U. S. 49; *Titus* v. *Wallick*, 306 U. S. 282. Whatever mechanics of law may underlie the judgment (*Cooper* v. *Reynolds*, 10 Wall. 308) it is 'conclusive as to all the *media concludendi*.' *Fauntleroy* v. *Lum*, *supra*, at page 237."

In the face of these well settled principles, the Federal Court has chosen to disregard the terms of the order of the Circuit Court of Cook County, which is, under the Illinois Banking Act, charged with the responsibility of liquidating the affairs of the bank. The Circuit Court order states that Miner is free to prosecute his claim in the Federal Court for a larger amount than that which he agreed to accept from the receiver of the insolvent bank. The Federal Court ignores this preservation of right and holds that Miner is bound by a bargain he did not make; that when he bargained his share in the assets of the bank, he was at the same time limiting his recovery from the stockholders. The Federal Court accepts the State Court's order for a purpose for which it was not intended, namely, limitation of recovery from the stockholders, and rejects it as to the provision preserving Miner's rights against the stockholders.

The order allowing a claim in a bank liquidation proceeding is a final order having the effect of and being in fact a judgment. *People* v. *Farmers State Bank*, 281 Ill. App. 354. The Circuit Court had jurisdiction (R. 39). *People* v. *Ottawa B. & T. Co.*, 287 Ill. App. 499, 5 N. E. (2d) 275. The court's refusal to respect the judgment has the effect of denying to Miner any recovery whatsoever from the stockholders of the bank, since the greater part of the claim in the liquidation proceeding has been paid and all, or substantially all, of the balance will be paid from funds in the receiver's hands. The beneficiaries of a quarter million dollar trust, dissipated by the maladministration of the insolvent corporation, are precluded from recovering from the stockholders of that corporation lia-

bilities imposed by the Constitution of the State of Illinois. Because Miner decided to terminate bootless litigation with the receiver of an insolvent corporation, upon the assurance that he could continue to pursue his claims against the solvent stockholders, he has been denied the right to recover from those stockholders. He did release the bank and the receiver of the bank but he did so in reliance upon the commonly accepted view of the bar and bench of the State of Illinois that he could effectively reserve his rights against the stockholders. He had the assurance of the order of the Circuit Court of Cook County that he might continue to prosecute his claim (R. 42) and the acceptance of the nominal claim of $25,000.00 should not be deemed an adjudication of the total loss suffered by the trust estate (R. 43).

Miner proceeded to introduce proof in the Federal Court of the nature and extent of his claim and establish damages in the total sum of $229,409.52. The stockholders, against whom judgment was sought and who are the only persons affected by the allowance or disallowance of Miner's claim, put in no proof whatsoever. The Reconstruction Finance Corporation (purporting to represent Miner as a creditor of the bank, as well as all other creditors of the bank) took it upon itself to oppose the allowance of Miner's claim, although the claim was asserted against stockholders against whom the Corporation itself could not possibly recover. Miner's claim accrued on July 25, 1931, long before the Reconstruction Finance Corporation became a creditor of the bank (R. 55). The stockholders did not appear in the Circuit Court of Appeals to contest the allowance of Miner's claim. There has been and is no defense upon the merits. Miner's claim, if it is to be defeated at all, can be defeated only by an application of the rule that the release of one joint obligor necessarily discharges the others, despite an express contrary reservation. It is further necessary to accept in part and to reject in part a judgment of

the Circuit Court of Cook County and to hold a final order of a court having jurisdiction of the subject-matter an empty and meaningless mockery. The courts below have seen fit to take both steps at the request of a government corporation having no monetary interest in the outcome. The clearly expressed intention of the Circuit Court of Cook County and the litigants before it has been denied and frustrated. The judgment of the Circuit Court has been flouted and disregarded as a nullity. The decision of the court below should be reversed. The writ of certiorari should be issued to review that judgment.

Respectfully submitted,

ALFRED COOKMAN MINER, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased,

Petitioner.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:	
Reconstruction Finance Coropration v. *McCormick*, 102 F. (2d) 305, certiorari denied, 308 U. S. 558	3
Richmond v. *Irons*, 121 U. S. 27	7
Sanders v. *Merchants State Bank*, 349 Ill. 547	5
Schalucky v. *Field*, 124 Ill. 617	5
Miscellaneous:	
Constitution of Illinois:	
Sec. 6 of Art. XI	2, 5

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 306

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion (R. 54–55). The opinion of the Circuit Court of Appeals (R. 120–124) is reported in 128 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 18, 1942 (R. 125). The peti-

tion for a writ of certiorari was filed August 14, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the liability of the stockholders of the Central Republic Trust Company to a creditor is the same as the liability of that bank to that creditor.

2. Whether the petitioner, as a creditor of the Central Republic Trust Company, was bound by a final decree entered in the Circuit Court of Cook County, Illinois, on August 18, 1939, in a suit in which the petitioner and the bank were parties, and the liability of the bank for the acts and omissions complained of was determined to be the sum of $25,000.

CONSTITUTIONAL PROVISION INVOLVED

Section 6 of Article XI of the Constitution of Illinois, which provides for the liability of stockholders of Illinois banks to the creditors of banks, reads as follows:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

STATEMENT

Reconstruction Finance Corporation brought suit on behalf of itself and all other creditors of the Central Republic Trust Company, of Chicago, to enforce the liability of stockholders of that bank to its creditors provided for in Section 6 of Article XI of the Illinois Constitution. Decrees entered against the stockholders were affirmed by the Circuit Court of Appeals for the Seventh Circuit in *Reconstruction Finance Corporation* v. *McCormick,* 102 F. (2d) 305, certiorari denied, 308 U. S. 558. Orders were then entered giving creditors of the bank leave to file their claims. The petitioner filed the claim here involved on February 21, 1938 (R. 6).

Prior to 1933 the bank had been trustee of the estate established by the will of petitioner's mother. On April 3, 1933, the bank filed a bill of complaint in the Circuit Court of Cook County, Illinois, requesting the appointment of a successor trustee to itself. On November 10, 1933, that court appointed petitioner as successor trustee and reserved jurisdiction for settlement of the accounts of the bank as trustee (R. 115). In that action, petitioner filed a cross bill against the bank based upon the same claim that was filed by him in the case at bar (R. 33). On August 18, 1939, the Circuit Court of Cook County entered a final decree (R. 32–39), which found that the bank had violated its trust in one of the in-

stances alleged, entitling petitioner to damages in the sum of $25,000, but that the bank was not otherwise liable, and directed that petitioner file a claim for such amount in the liquidation proceedings of the bank then also pending in the Circuit Court of Cook County (R. 36–39).[1] This decree contained no reference to or reservation of petitioner's rights against the bank's stockholders in the present proceeding, then pending in the federal district court.

Thereafter, in the suit for the liquidation of the bank, an order was entered on April 13, 1940, allowing petitioner's claim for $25,000 against the bank (R. 39–43). In that order (which was

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[1] The decree provides that—

"Said action and failures to act, and particularly the refusal of said Trustee to accept certain offers to purchase the so-called Ainslie Street property, were breaches of trust on the part of said Trustee, and, after the allowance of all proper credits, charges and offsets to said Trustee, resulted in a net loss to said trust estate in the sum of $25,000, with which said sum the accounts of said Trustee should be charged. * * * Except for the breaches of trust in said cross-bill and objections more particularly described, the actions of said Central Republic Trust Company and of its corporate predecessor, as Trustee, and its failures to act, were in every way proper and justified, and objections numbered 1, 2, 14 and 18, in part, should be overruled. Said Trustee and said Receivers, except as in this paragraph more particularly found, are under no liability to said trust estate or to any of the beneficiaries thereof or to any Successor Trustee heretofore or hereafter appointed for any of their acts and doings as Trustee or as Receiver, respectively, or in their individual capacities or for any failure to act whatsoever" (R. 36).

entered during the course of the hearings of the petitioner's claim before the Master in the present case), there also appears a provision reciting that the entry of the order was "without prejudice to any right" of petitioner to prosecute his claim for a larger amount against the stockholders in the case at bar (R. 43).

The petitioner's claim filed in the case at bar on February 21, 1938, (R. 6) was referred to a Master, who ruled that the final decree of August 18, 1939, had limited the liability of both the bank and its stockholders to $25,000 (R. 44–49). Petitioner filed objections and exceptions to the Master's report (R. 53, 54) which were overruled by the District Court (R. 54, 55). The Circuit Court of Appeals affirmed the ruling of the District Court (R. 125).

ARGUMENT

1. Section 6 of Article XI of the Illinois Constitution makes the stockholders of a bank liable, to an amount equal to their investment, for "*its* liabilities" to "*its* creditors." The decree of August 18, 1939, determined that the bank was liable to petitioner for $25,000 and no more. The Illinois cases, construing the constitutional provision to mean what it says, hold that the liability of the stockholders is identical with and no greater than that of the bank. See *Sanders* v. *Merchants State Bank,* 349 Ill. 547, 564 (1932); *Schalucky* v. *Field*, 124 Ill. 617 (1888).

Petitioner attempts to avoid the conclusion that the stockholders' liability was no greater than that of the bank by reliance on the reservation of rights against the stockholders in the subsequent order of April 13, 1940. But that order could not have enlarged the liability of the stockholders, which was the same as that of the bank. Since the liability of the bank had previously and finally been decreed to be only $25,000, the stockholders could not be liable for a greater amount. The ruling of the court below to this effect was clearly correct.

2. Petitioner argues that the court below relied on overruled Illinois decisions when it said that "a release of one person releases the other in spite of any attempted reservation of rights against the other partners" (R. 124). This statement was unnecessary to the decision, and this Court, on review, would not be called upon to decide whether it was correct. Even if the reservation of rights were effective as against the stockholders, for reasons set forth above the prior determination of the bank's liability in the final decree of August 18, 1939, left petitioner with no rights to preserve. Petitioner's extended analysis (Br. 7–16) of the Illinois law as to the effect of such a reservation is thus entirely irrelevant.[2]

[2] Petitioner seems to believe that the decree of August 18, 1939, did not deprive it of rights against the stockholders for damages in excess of $25,000, because of recitals in the order to April 13, 1940, that the parties to the first proceeding had

3. Petitioner's argument that the decision below denied full faith and credit to the order of the Illinois court disregards the "final decree" entered by that court on August 18, 1939. Since the court below placed its decision squarely upon this ruling of the state court, the contention is plainly without substance.

4. At the close of his brief (pp. 18–19), petitioner implies that the respondent improperly opposed Miner's claim. The respondent has an interest in the outcome of this action because it will share as a creditor in the distribution of the fund collected from stockholders of the bank. The respondent, as a creditor, has the right to contest the amount of the petitioner's claim. *Richmond* v. *Irons*, 121 U. S. 27, 53. The respondent, as the plaintiff in the stockholders' liability suit, has the right and duty to protect not only its rights but the rights of all creditors by taking every step which is necessary to insure that the creditors' claims shall be allowed only in the proper amounts.

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agreed that the findings were to be without prejudice (R. 41–42). But whatever the parties agreed to was merged into the final decree, which affirmatively limits the bank's liability and contains no such reservation. Furthermore, the testimony cited by petitioner for the existence of such an oral agreement changing the terms of the so-called consent decree (R. 23–25) gives little support to the contention that such an agreement was made.

CONCLUSION

The decision below is correct. It is not in conflict with the decisions of the courts of Illinois which control in the present case. No question of public importance is presented. It is, therefore, respectfully submitted that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 306

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR RECONSIDERATION OF DENIAL OF APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, A. D. 1942.

No. 306.

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

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vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR RECONSIDERATION OF DENIAL OF APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner, Alfred Cookman Miner, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased, prays this court to reconsider its denial of his original petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Counsel for respondent tacitly concede that the court below has erroneously decided a question of Illinois law.

The contention is made that the ruling was unnecessary to its decision, but a reference to the opinion clearly indicates that far from being unnecessary to the decision the principle announced by the court is, in fact, the *ratio decidendi* of the case.

Counsel for respondent urge that "since the liability of the bank had previously and finally been decreed to be only $25,000.00, the stockholders could not be liable for a greater amount." The difficulty with this statement is that respondent confuses the amount of the liability of the bank with the amount for which the liability of the bank was compromised. It should be apparent that the latter would, in the very nature of things, be smaller than the former, else the decree would be one not of compromise but of payment.

No authority is stated by respondent for its contention that the decree of August 18, 1939, was final. The decree is so labeled but was not in fact or in Illinois law final. The decree by its very terms did not conclude the matter before the court but referred the case for final conclusion to the liquidating suit brought by the Auditor of Public Accounts to wind up the affairs of the bank. Under the law of Illinois as expressly stated by the Circuit Court of Appeals, it is the order allowing the claim of that court which is the final order in this case (Tr. 123). That order was entered April 13, 1940, and it is by that order that petitioner's claim has been preserved. If there is any conflict in terms between the two orders, the later in point of time controls. (*Bank of Montreal* v. *Griffin*, 190 Ill. App. 221; Cert. den. 191 Ill. App. XIII.) The Circuit Court of Appeals rejected the contention advanced by respondent that petitioner's rights are to be read solely in the light of the terms of the order of August 18, 1939. The court itself expressly stated that whether it considered both orders or only the subsequent order of April 13, 1940, the petitioner is entitled to no

recovery, since the release of one person jointly liable releases all others (Tr. 123-4).

The order allowing petitioner's claim in the liquidation proceeding constituted a final adjudication. (*Albers* v. *Blue Island Trust & Savings Bank*, 301 Ill. App. 398; *People* v. *Farmers & Merchants State Bank*, 281 Ill. App. 354.) The court entrusted with the liquidation of the bank's affairs was the only court having jurisdiction of the subject-matter. (*People* v. *Ottawa B. & T. Co.*, 287 Ill. App. 499, 5 N. E. (2d) 275.) As to the previous decree, the court found:

> "No proof was offered or made in said cause as to the extent of damages incurred by the trust estate created under the Last Will and Testament of Julia A. Miner, Deceased, by reason of the aforesaid breaches of trust, but it was agreed by the parties to said cause that the court might allow a claim for $25,000.00 to be paid in due course of administration upon a parity with claims of a like character and preference out of the assets then or thereafter to come into the hands of the said receiver, the allowance of said claim to be a full and complete release of all claims and rights of said Alfred Cookman Miner, as Trustee, and of all persons interested in said trust estate against Central Republic Trust Company, as Trustee and individually, and against Charles H. Albers, as Receiver and individually; it being further agreed that said findings should be without prejudice to any right of Alfred Cookman Miner, as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased, to continue to prosecute a claim for a larger amount theretofore filed by him in case No. 14189 pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled 'Reconstruction Finance Corporation, etc., *vs.* Central Republic Trust Company, etc., *et al.*'; and that said decree should be without prejudice to any right of the said Alfred Cookman Miner to establish and prove further and additional claims

for damages arising out of the administration of the trust herein by the Central Trust Company and the Central Republic Bank and Trust Company against the stockholders of said companies." (Tr. 41-42.)

It thereupon ordered as follows:

"It Is Further Ordered, Adjudged, and Decreed that the entry of this order shall be without prejudice to any right of Alfred Cookman Miner to prosecute claims which the said Alfred Cookman Miner has already asserted in cause No. 14189 in the United States District Court for the Northern District of Illinois, Eastern Division, being the cause entitled, 'Reconstruction Finance Corporation, etc. *vs.* Central Republic Trust Company, etc., *et al.*,' but the fixing of said claim in the amount of Twenty Five Thousand ($25,000.00) Dollars shall not be deemed an adjudication of the extent of damages suffered by the trust estate but a determination for the sole purpose of settling the extent of participation by the said trust estate in the assets now or hereafter to come into the hands of the said receiver in this cause." (Tr. 43.)

The Circuit Court of Appeals rejected the foregoing terms of the order of the Circuit Court for the reason and only for the reason that "such release of the bank also released the stockholders from all damages above that amount, regardless of the attempted reservation of the right to recover a greater amount from the stockholders." In this the court was in error, as was conclusively established in petitioner's original brief and as conceded by counsel for respondent.

The only conceivable consideration upon which this court might refuse to consider petitioner's case is that of public interest. It is respectfully submitted that a clear misapplication and misstatement of Illinois law lying at the crux of this case is a matter of sufficient interest to merit this court's attention. Petitioner has been barred from asserting a right of recovery against stockholders

in the face of a solemn contrary agreement as set forth and approved by a court of competent jurisdiction having exclusive control of the subject-matter. Petitioner prays that this court may reconsider its action in denying petition for certiorari herein and order the writ to issue.

Respectfully submitted,

ALFRED COOKMAN MINER, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased,
Petitioner,

GEORGE EDWARD LEONARD, JR.,
Counsel for Petitioner.

GEORGE EDWARD LEONARD, JR., certifies that the foregoing petition for reconsideration of this court's denial of petitioner's application for writ of certiorari is made in good faith and not for the purpose of delay.

GEORGE EDWARD LEONARD, JR.